

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

April 22, 1998

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324a Proceeding
) OCAHO Case No. 98A00015
VALENCA BAR & LIQUORS, INC.,)
Respondent.)
_____)

ORDER DENYING MOTION FOR SUMMARY DECISION

I. Introduction

This case poses two questions, one of first impression in OCAHO jurisprudence:

- Does an employer’s application to the Department of Labor for a labor certification for an alien not authorized to work in the United States, *per se*, constitute an admission that the employer **knowingly** hired or continued to employ the alien, thereby violating 8 U.S.C. §1324a(a)(1)(A) and/or 8 U.S.C. §1324a(a)(2)?
- What are indicia of a good faith attempt to comply with the employment verification procedures of 8 U.S.C. §1324a(b)? What set of factual circumstances constitutes a good faith attempt at compliance?

“Good faith compliance” as to paperwork violations under 8 U.S.C. §1324a(b) is not defined in statutory law and has not yet been defined by OCAHO case law. Pertinent regulations defining good faith

compliance, promulgated by the Immigration and Naturalization Service (INS) and published in *draft* in the April 7, 1998 *Federal Register*, are not yet in effect. See Limiting Liability for Certain Technical and Procedural Violations of Paperwork Requirements, 63 Fed. Reg. 16,909 (1998) (to be codified at 8 C.F.R. pt. 274a) (eschewing a definition of “good faith,” and holding 8 U.S.C. §1324a as amended applicable to continuing paperwork violations persisting on or after September 30, 1996, “even if the failures first occurred on [an INS] Form I-9 prepared before the date of enactment,” but inapplicable to “individual attestation of employment authorization on a verification form” because individual attestation is a “principal component” of Form I-9).

On March 6, 1998, INS moved for summary decision. The function of summary decision is to avoid an unnecessary evidentiary hearing where there is no genuine issue of material fact, as shown by pleadings, affidavits, discovery, and judicially-noticed matters. *Celotex v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2555 (1986).

Summary decision is appropriate only “if the pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 28 C.F.R. §68.38(c) (1997). On the other hand, “[w]here a genuine question of material fact is raised, the Administrative Law Judge shall, and in any other case may, set the case for an evidentiary hearing.” 28 C.F.R. §68.38(e). A “material fact” is one which controls the outcome of the litigation. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). “In assessing the existence of genuine issues of material fact, all favorable inferences that are reasonably possible should be drawn in favor of the non-moving party. If a genuine issue of fact is gleaned from this analysis, summary decision is not appropriate.” *United States v. Christie Automotive Products*, 1991 WL 531233, at *1 (O.C.A.H.O.). I am unable to conclude, for reasons elaborated below, that the pleadings, affidavits, and other evidence demonstrate the absence of a genuine issue of material fact.

This order expands upon my April 16, 1998 denial of the INS Motion for Summary Decision.

II. The Law

This case, evolving from a series of events beginning on November 14, 1996,¹ is an early application of the 1996 “Sonny Bono” “good faith” amendment to charges of §1324a(b) employment verification paperwork violations. Pub.L. 104–208, pertaining to violations occurring on or after September 30, 1996, interposed good faith compliance as a defense to paperwork violations:

Except as provided in subparagraphs (B) [an exception where the employer fails to correct a paperwork violation within a period of not less than ten (10) days after INS notice] and (C) [exception for pattern or practice violators], a person or entity is considered to have complied with a requirement of this subsection [employment verification] notwithstanding a technical or procedural failure to meet such requirement if there was a *good faith* attempt to comply with the requirement.

Title 8 U.S.C. §1324a(b) (6) (emphasis added).

Good faith has always been a defense to charges of knowing hire:

A person or entity that establishes that it has complied *in good faith* with the requirements of subsection (b) of this section [the employment verification procedure] . . . has established an affirmative defense that the person or entity has not violated paragraph (1) (A) with respect to . . . hiring, recruiting, or referral.

Title 8 U.S.C. §1324a(a) (3) (emphasis added).

¹Chronology in a nutshell:

- **Nov. 14, 1996**—Valenca labor certification application for Elpidio Raimundo Vasquez Hernandez results in INS “site survey;” during survey, INS arrests three illegals, but *not* Hernandez.
- **Nov. 26, 1996**, INS inspects Valenca’s INS Forms I–9 and finds four forms incomplete.
- **Apr. 8, 1997**, INS issues Notice of Intent to Fine (NIF).
- **May 8, 1997**, Valenca requests hearing before Administrative Law Judge.
- **Oct. 20, 1997**, INS files OCAHO Complaint.
- **Dec. 1, 1997**, Valenca files Answer.
- **Mar. 6, 1997**, INS moves for Summary Decision.
- **Mar. 17, 1997**, Valenca opposes motion.

III. *Facts and Inferences*

Sometime between January 12, 1996,² and April 1996,³ Elpidio Raimundo Vasquez Hernandez (Hernandez) sought employment with Valenca, utilizing, as proof of his eligibility to work in the United States, a forged Social Security card.⁴ Despite Hernandez' utilization of a Social Security card which on its face appeared to be genuine, INS contends that Valenca hired Hernandez *knowing* that he was not work-authorized.

After hiring Hernandez, Valenca discovered that he was not work-authorized, and submitted an Application for Alien Employment (labor certification application) on June 6, 1996.⁵ Whether or not Valenca continued to employ Hernandez thereafter is one of the facts in dispute. According to the labor certification application, Hernandez "started" at Valenca in March 1996, and "left" on June 6, 1996.⁶

INS admits that Valenca's labor certification application instigated an INS sweep of Valenca's premises:

On November 14, 1996, two Special Agents of the INS conducted a work-site survey on the Respondent, wherein three undocumented, unauthorized aliens were arrested. The survey was conducted as the result of an Application for Alien Employment Certification (DOL ETA 750) filed by Respondent on behalf of . . . Elpidio Raimundo Vasquez Hernandez.

Memorandum of Law in Support of Complainant's Motion For Summary Decision (Memorandum) at pp. 1-2.

The November 14, 1996 "survey" resulted in the arrest and processing for deportation of three undocumented employees — Oneida

²The date on which Hernandez signed INS Form I-9 (Complainant's Memorandum of Law in Support of Summary Decision, Exhibit G).

³Inconsistently, the labor certification application for Hernandez says, at §15.a, that he was hired on April 4, 1996, but Hernandez, in his Affidavit, cites March 1996 as the date of hire (Complainant's Memorandum of Law in Support of Summary Decision (Memorandum), Exhibits E and F).

⁴Memorandum, Exhibit G.

⁵Memorandum, Exhibit E.

⁶Memorandum, Exhibit E, Application for Alien Employment Certification, at §15.a. (DATE STARTED: 4/96; DATE LEFT: Present [June 6, 1996]). I am obliged to construe this potential ambiguity in Valenca's favor.

Assuncao Souza, Janeth Paredes, and Jorge Manuel Leandro/Seandro.⁷ However, Hernandez — as far as appears from INS exhibits — was neither arrested nor processed for deportation, inviting the inferences that Hernandez either had been granted work authorization pursuant to the June 6, 1996 labor certification application or was no longer in Valenca’s employ.

Of the three arrested employees, two had overstayed their B–2 visas (Souza and Paredes) and one (Leandro/Seandro) entered the United States illegally.⁸ INS does not contend that Valenca *knowingly* hired *them*. Instead, INS alleges that Valenca knowingly hired Hernandez *because* it submitted a labor certification application for him.⁹

Following the November 14, 1996 “survey,” according to INS Special Agent Michael Geiger (Geiger) (whose December 22, 1997 affidavit INS submits in support of its Motion for Summary Decision), “Martinho Pereira, an owner of Valenca Bar & Liquors, appeared at the Investigations Unit after the interviewing and processing of the arrested aliens were completed.”¹⁰ Geiger does not indicate *when* Pereira appeared, or whether his appearance was voluntary or compelled.

Whenever or for whatever reason Pereira “appeared,” Geiger

questioned Mr. Pereira regarding the status and employment authorization of the three arrested aliens and of Elpidio Raimundo-Vasquez [Elpidio Raimundo Vasquez-Hernandez, according to the Complaint], an alien on whose behalf an

⁷The name is variously given as Jorge Manuel Leandro or **Seandro** in documents INS presents. For example, Exhibit 1, Response to Respondent’s Opposition to Motion for Summary Judgment, Record of Deportable Alien gives his name as Leandro, as does the November 14, 1996 Affidavit in an Administrative Proceeding, the first page of which is clearly initialed JML. However, the third page of the affidavit is clearly signed “Jorge Manuel **Seandro**,” raising the possibility that the initials on the first page were added by a third party to correspond to his or her misunderstanding of **Seandro**’s name. The November 14, 1996 Affidavit repeats an error on the first page of Seandro’s I–9, which gives his last name as Leandro, but the Social Security card attached to the I–9 clearly gives his name as Jorge Manuel **Seandro**. Memorandum, Exhibit G. It should also be noted that the signatures on the Social Security card and the last page of the Affidavit are not identical. Because INS does not contend that Valenca knowingly hired Seandro, these are merely observations about submissions, and have no bearing on the knowing hire of Hernandez.

⁸Response to Respondent’s Opposition to Summary Decision, Exhibits 1, 2, and 3.

⁹Complaint, Count I.

¹⁰Memorandum of Law in Support of Summary Decision, Exhibit A, Geiger Affidavit, ¶4.

Application for Alien Employment Certification (DOL ETA 750) had been signed by Mr. Pereira for Valenca Bar & Liquors, Inc. . . . In response to the question [not recounted by Geiger], Mr. Pereira answered that he knew Elpidio Raimundo-Vasquez [Hernandez] was unauthorized to work in the United States and that was the reason why he had filed a labor certification on Raimundo-Vasquez' [Hernandez'] behalf.

Memorandum, Exhibit A, Geiger Affidavit, ¶¶5, 6. Geiger does not describe the nature of the question posed to Pereira. Nor does Geiger indicate whether Valenca employed Hernandez *after* it discovered he was illegal or at the time of raid. If Hernandez was in Valenca's employ, INS does not explain why Hernandez was neither arrested nor processed for deportation, as were the three other illegal aliens.

After the raid,

On November 26, 1996, Complainant inspected Respondent's Forms I-9. The Complainant determined that four Forms I-9 were deficient because the Respondent failed to verify the employment eligibility of its employees.

Memorandum at pp. 1-2.

The four employees whose Forms I-9 INS found deficient were: Leandro/Seandro, Paredes, Souza, and Hernandez. Although partially completed, and accompanied by photocopies of individual Social Security cards, the Forms I-9 omitted at least the following information:

- **Leandro/Seandro**—Section 1: attestation box not checked; wrong box dated; Section 2: appropriate box not checked, although photocopied Social Security card attached; although signed, employer name, title, address, and date not given. Memorandum, Exhibit G. (According to INS affidavit, Seandro entered U.S. illegally. Response to Respondent's Opposition to Motion for Summary Decision, Exhibit 1.)
- **Janeth Paredes**—Section 1: attestation box not checked; Section 2: appropriate box not checked, although photocopied Social Security card attached; although signed, employer name, title, address, and date not given. Memorandum, Exhibit G. (According to INS affidavit, overstayed B-2 Visa. Response, Exhibit 2.)

- **Oneida Assuncao Souza**—Section 1: attestation box not checked; Section 2: appropriate box not checked, although photocopied New Jersey driver's license attached; although signed, employer name, title, address, and date not given. Memorandum, Exhibit H. (According to INS affidavit, overstayed B-2 Visa. Response, Exhibit 3.)
- **Elpidio Vasquez Hernandes/Hernandez**¹¹—Section 1: attestation box not checked; Section 2: appropriate box not checked, although photocopied Social Security card attached; although signed, employer name, title, address, and date not given. Memorandum, Exhibit G. (According to INS affidavit, entered U.S. illegally. Memorandum, Exhibit F.)

By letter dated April 8, 1997, INS served Valenca with a Notice of Intent to Fine (NIF). On May 8, 1997, Valenca requested a hearing before an Administrative Law Judge (ALJ).

On October 20, 1997, INS filed a Complaint Regarding Unlawful Employment with the Office of the Chief Administrative Hearing Officer (OCAHO):

- Count I alleges that Valenca *knowingly* hired or continued to employ Hernandez, an alien not authorized to work in the United States, and thereby violated either 8 U.S.C. §1324a(a)(1)(A) or §1324a(a)(2), which render it unlawful to employ illegal aliens after November 6, 1986. INS requests a civil money penalty of **\$687.50**, and an order that Valenca cease and desist from hiring illegal aliens.
- Count II alleges that Valenca failed to ensure that four named employees (Jorge Manuel Leandro/Seandro, Janeth Paredes, Oneida Assuncao Souza, and Elpidio Raimundo Vasquez Hernandez) properly completed Section 1 of INS Form I-9, the employment eligibility verification form, and it-

¹¹INS documents contain a panoply of names whereby Hernandes/Hernandez is designated. His Form I-9, for example, in Section 1 denominates him Hernandez, but he signs Section 1 as "Elpidio R. Vasquez-Hdez." Memorandum, Exhibit G. The Social Security card attached to the Form I-9 gives his names as "Elpidio Vasquez Hernandez." *Id.* An affidavit INS submitted gives his name as "Elpidio Raimundo-Vasquez," but the affidavit itself is signed by "Elpidio Vasquez Hdez." Memorandum, Exhibit F.

self improperly completed Section 2. INS requests a civil monetary penalty of **\$1,480** (\$370 for each individual).

INS requests a total civil money penalty of **\$2,167.50**.

On October 22, 1997, OCAHO issued its Notice of Hearing.

On December 1, 1997, Valenca filed its Answer. Valenca generally denies the truth of the allegations, and interposes as affirmative defenses its good faith¹² attempt to comply, due diligence, substantial compliance, and lack of notice.¹³

Valenca also argues that the proposed civil money penalty is excessive and inappropriate, because: 1) it is a new business with fewer than fifteen employees; 2) *if* a violator, a first-time offender; 3) it acted in good faith; 4) its violations, if any, are technical paperwork deficiencies; 5) it was not given the requisite statutory opportunity¹⁴ to correct them; 6) it cooperated fully in the INS inspection; 7) given its small size, enhanced penalties will not increase the probability of its compliance. Valenca requests that the Complaint be dismissed, or, in the alternative, that civil money penalties be reduced to reflect its status as a small employer who acted in good faith.

An initial telephonic prehearing conference took place on January 23, 1997; a second, on February 9, 1998; a third, on February 18, 1998.

On March 6, 1998, INS moved for summary decision on the pleadings and filed a memorandum in support of the motion.

¹²See 8 U.S.C. §1324a(a)(1)(3) (good faith compliance with paperwork requirements an affirmative defense to charge of knowing hire), 8 U.S.C. §1324a(b)(6) (good faith defense not obviated by “technical or procedure” defects unless Service gave notice and employer refused to comply having been provided at least ten business days to do so, or unless employer is pattern or practice violator).

¹³Effective September 30, 1996, an employer “is considered to have complied with a requirement of this subsection [employment verification] notwithstanding a technical or procedural failure to meet such a requirement if there was a good faith attempt to comply with the requirement” unless, after explaining to the employer its failure, the INS provided the employer at least ten business days after notice to correct the failure, and the employer did not voluntarily do so. 8 U.S.C. §1324a(b)(6).

¹⁴*Id.* (“[A] period of **not less** than 10 business days (beginning after the date of the explanation) within which to correct the failure, and . . . the person or entity has not corrected the failure voluntarily within such period”).

INS argues that Valenca's president, Martinho Pereira, "admitted to the two INS agents that he knew Mr. Raimundo-Vasquez [Hernandez] was unauthorized to work in the United States."¹⁵ As evidence, INS submits Exhibits A and B, the affidavits of Special Agents Geiger and Reginald France (France), who state that Pereira admitted seeking a labor certification application for Hernandez, whom he knew was not work-authorized. "Pereira . . . knew Elpidio Raimundo-Vasquez [Hernandez] was unauthorized to work in the United States and that was the reason why he had filed a labor certification application on Raimundo-Vasquez' [Hernandez]' behalf."¹⁶ It is INS' contention that this simple statement is: 1) an admission that Pereira hired Hernandez knowing him *at the time* to be an illegal alien; 2) an admission that Valenca continued to employ Hernandez *after* discovering that he was illegal; and 3) an admission that Valenca employed Hernandez on November 14, 1996, the day of the arrests.

But other evidence tendered in support of the motion rebuts the moving party's speculative conclusions. For example,

- Hernandez' Form I-9, signed 1/12/96, to which is attached a Social Security card of presumptive regularity (which INS does not contend Valenca knew at hire to be a forgery), may demonstrate that, at the time of hire, Valenca had reason to believe that Hernandez was work-authorized;
- The June 6, 1996 labor certification application Valenca filed through its agent Martin C. Liu, Esq. (Valenca presumably having discovered in the interval between hire and certification that Hernandez was illegal) rebuts the contention that Valenca knew Hernandez was illegal when it hired him. It remains to be proven that, **had Valenca knowingly hired an illegal, and wished to break the law, it would later have initiated a labor certification process which would precipitate an INS "survey."** Furthermore, the labor certification application at §15.a recites that Hernandez "started" in 4/96 and "**left**" in the "present". A reasonable inference is that Valenca promptly suspended Hernandez' employment upon discovering his illegality, and immediately filed the certification.

¹⁵Memorandum at p. 1.

¹⁶Memorandum, Exhibit A, Geiger Affidavit, ¶¶5, 6.

- INS states that only three aliens (Leandro/Seandro, Paredes, and Souza) were arrested in November 14, 1998, indicating that: 1) Hernandez was not arrested, which he presumably would have been had he been in Valenca’s employ, or, alternatively, perhaps, 2) his status by then had become regularized, so that he was no longer “illegal,” and, therefore, not subject to arrest. INS fails to explain why Hernandez, the subject of the most serious charge against Valenca, was not arrested.

As a preliminary matter, application for a labor certification is not an admission that one proposes to or has knowingly hired an illegal. The Geiger affidavit is insufficient to persuade a trier of fact that Valenca hired Hernandez *knowing* him to be illegal, or failed to discharge him during the pendency of the labor certification process, or that Hernandez worked for Valenca on November 14, 1998. Geiger’s affidavit does establish that Valenca used the labor certification procedure for the purpose it was intended — *i.e.*, to obtain appropriate work authorization for an alien.

The France affidavit, which describes the exchange between Geiger and Pereira, is — like that of Geiger — dated December 22, 1997, thirteen months after the events described. According to France, Pereira was questioned in his presence by Geiger

regarding the status and employment authorization of the three arrested aliens and of Elpidio Raimundo-Vasquez [Hernandez], an alien on whose behalf an Application for Alien Employment Certification (DOL ETA 750) had been signed by Mr. Pereira for Valenca. . . . In response to the question, Mr. Pereira answered that he did not know the three arrested aliens were undocumented workers, but that he knew Elpidio Raimundo-Vasquez [Hernandez] was unauthorized to work in the United States.

France Affidavit, ¶¶5, 6.

France confirms that Hernandez was not arrested on November 14, 1996, and reiterates that Valenca, through Pereira, knew at the time it filed the labor certification application that Hernandez was not work authorized. Even if Valenca knew of the employee’s lack of status when it made that filing, it is not clear that it knew Hernandez was illegal ***at the time of hire or continued*** to employ Hernandez after discovering his illegality, or that Hernandez was in Valenca’s employ on November 14, 1996.

INS appends as Exhibits C and D France's and Geiger's Memoranda of Investigation.

On 11/14/96 the writer and S.A. France questioned the owner of the above Bar & Rest. as to his knowledge of Elpidio Raimundo-Vasquez [Hernandez] being unauthorized to work in the U.S. per his labor cert. Mr. Martinho Pereira, the owner, stated that he knew the above subject was unauthorized to work in the U.S.: that's why he filed a labor cert for him. *The owner [sic] daughter Michelle Pereira also stated that she knew subject Pereira [sic!?] was an unauthorized alien . . .*

Memorandum, Exhibit D, Geiger Memorandum of Investigation (emphasis supplied). According to the Memorandum of Investigation, Pereira's daughter stated that she knew her *father* was an unauthorized alien, not that Hernandez was unauthorized. This document does not establish that Valenca *knew Hernandez* was illegal *at the time of hire*, or that Valenca retained Hernandez while it sought labor certification for him.

To bolster its Motion for Summary Decision, INS appends to its Memorandum, as Exhibit F, Hernandez' November 19, 1996 Affidavit, a document dated five days after the "survey." Hernandez admits that he entered the U.S. without inspection in December 1993 and claims to have worked from March 1996¹⁷ for Valenca, who paid him each week by check at a rate of \$6 an hour. Hernandez simply states that he worked for Valenca since March 1996 (the INS form affidavit does not query date of termination). Hernandez does not claim that Valenca *knew* he was not work-authorized when it hired him, or that Valenca continued to employ him after discovering that he was not work-authorized. In fact, Valenca had little reason originally to suspect that Hernandez was not work-authorized, because he presented a facially authentic Social Security card, a document which by itself establishes that its bearer is work-authorized. That Hernandez utilized this forged document may only suggest he was dishonest and Valenca credulous.

Valenca's Opposition to Motion for Summary Decision (Opposition) relies on Pereira's denial that he made any statement that could reasonably be construed as admitting the charges in the

¹⁷Elsewhere Hernandez indicates he worked for Valenca beginning from 1/12/96 (the date on which he signed his I-9) and from April 1996 (the starting date given on his labor certification application at §15.a).

Complaint. Valenca argues that the agents' affidavits, a year after the events, "were not made contemporaneously with the work-site survey but were made with a specific purpose to 'create evidence' for the case. Such evidence is highly suspect, unduly prejudicial, and should be precluded." Opposition at p. 5. Valenca characterizes Geiger's representation that Michelle Periera "knew subject Pereira [her own father!] was an unauthorized alien" as untrue, and states that Geiger could not distinguish between Hernandez and Pereira:

Special Agent Geiger's failure to distinguish between the individual that he was questioning and the individual that was in his custody irreparably impugns his credibility. The failure of Special Agent Geiger to state such important facts correctly taints the accuracy of the entire memorandum of investigation. Additionally, Complainant stated in its Memorandum of Law that Special Agent Geiger's Form G-166C Memorandum of Law was made on the date of the work-site survey. However, the copy of G-166C, submitted as Exhibit D, [is] undated. Therefore, the Memorandum of Investigation prepared by Special Agent Geiger is unreliable evidence and is unduly prejudicial to the Respondent.

IV. *Conclusion and Order*

The primary factual issues in INS' knowing hire charge are: 1) whether Valenca *knew* that Hernandez was illegal at the time it hired him; 2) if it discharged him during the pendency of the labor certification application after discovering that he was illegal, or if it continued to employ Hernandez knowing he was not work-authorized; and 3) Hernandez' immigration status at the time of the November 14, 1996 "survey," and his relationship to Valenca on that day.

Considering the pleadings, affidavits, and exhibits in a light most favorable to Valenca, I find and conclude that INS has failed to establish *prima facie* that: 1) Valenca knew that Hernandez was illegal at the time of hire; and/or 2) it continued to employ Hernandez after learning that he was illegal; and/or 3) Hernandez was in Valenca's employ at the time of the "survey." INS makes no proffer that Valenca *knew* Hernandez was not work-authorized when it hired him. Indeed, INS submits a facially plausible forged Social Security card which Hernandez showed to Valenca when he completed his I-9. Far from demonstrating that this proves Valenca knew Hernandez was illegal at the time of hire, this establishes that Valenca reasonably might have concluded that Hernandez was work-authorized. Furthermore, INS does not offer evidence that Valenca continued to employ Hernandez after it learned of his immigration status. Such evidence might include pay stubs, checks (in his affidavit, Hernandez states that he was paid weekly by check), or any independent proof of Hernandez' continuing employment. In

order to prove that Valenca continued to employ Hernandez after learning of his immigration status, INS must demonstrate when Valenca learned of it, and that Hernandez was in Valenca's employ thereafter. This INS has not done.

I am therefore unable, as to both the substantive and paperwork violations, to conclude at this time that there is no genuine dispute of material fact. I therefore deny INS' Motion for Summary Decision as to the charge of knowing hire/continuing to employ, and defer decision regarding paperwork violations until the evidentiary hearing.

Since enactment of §101 of the Immigration Reform and Control Act of 1986, good faith compliance with employment verification paperwork requirements, codified as 8 U.S.C. §1324a(a)(3), has been an affirmative defense to charges of knowing hire. As of September 30, 1996, 8 U.S.C. §1324a(b)(6), interposes good faith as a defense to charges of paperwork violations. As noted above, this new defense has not yet been defined by final federal regulations or by case law.

I will expect the parties to submit preliminary memoranda of points and authorities relating to the statutory good faith defenses set forth at 8 U.S.C. §1324a(a)(3) and 8 U.S.C. §1324a(b)(6) to the charges of knowing hire, continuing to employ, and paperwork violations, with particular attention to the facts of this case, by no later than May 15, 1998, at the onset of the evidentiary hearing.

The parties are reminded that it may still be in their best interests to seek a negotiated settlement of this dispute.

SO ORDERED.

Dated and entered this 22d day of April, 1998.

MARVIN H. MORSE
Administrative Law Judge